THIEN TECK SOON

v.

PP

COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
JEFFREY TAN JCA
ZAHARA IBRAHIM JCA
[CRIMINAL APPEAL NO: Q-05-85-2007]
1 DECEMBER 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Possession of methamphetamine and cannabis - Whether accused had exclusive possession and knowledge of nature of drugs - Drugs found concealed in hotel room occupied by accused - Presumption under s. 37(g) Dangerous Drugs Act 1952 - Whether elements of custody or control established - Whether offence of possession proved*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in methamphetamine - Convicted and sentenced to death - Appeal against - Whether want of fingerprint evidence was fatal - Whether competency of chemist in analysing drugs established - Whether weighing instruments properly calibrated - Whether break in chain of custody and movement of drugs exhibits - Whether accused had exclusive possession and knowledge of nature of drugs - Whether drug sale transaction not completed as accused was still counting money when arrested - Whether opening address of prosecution failed to comply with s. 179(1) Criminal Procedure Code - Whether search list and drugs recovered not admissible because caution not immediately read to accused - Whether prosecution case proven beyond reasonable doubt*

CRIMINAL PROCEDURE: *Prosecution - Opening statement - Whether full details of prosecution's evidence must be particularised in opening statement - Whether prosecution can adduce at trial evidence not mentioned in opening statement*

CRIMINAL PROCEDURE: *Trial - Failure to cross-examine prosecution witness on crucial issue - Whether amounted to acceptance of witness's testimony*

EVIDENCE: *Expert evidence - Analysis of dangerous drug - Whether findings of government chemist proper - Whether necessary for chemist to support his findings with details of his analysis*

A ***EVIDENCE:*** *Information leading to fact discovered - Evidence Act 1950, s. 27 - Admissibility and proof - Whether any defect in caution administered affects admissibility of information leading to fact discovered*

Acting on information, the police conceived a sting operation to B lure the appellant to sell drugs to an agent provocateur ('PW5'). PW5 got in touch with the appellant and indicated his intention to purchase drugs. Several meetings were held to discuss matters relating to the purchase. On 3 May 2003, in Room 108 of the Royal Park Hotel, PW5 handed the money to the accused. The C accused took out a red bag from inside one of his stockings and handed it to PW5. PW5 opened that bag and found three packets of a crystalline substance. While the accused was counting the money, PW5 gave a signal to PW7 who was waiting in the adjoining room. Thereupon, PW7 burst into Room 108 and the D accused was restrained and arrested. PW7 read a caution to the accused and asked the accused as to where he kept the rest of the drugs. The accused replied "di bilik 504 Purnama Hotel". PW7 reduced the question and answer into writing (P25) and the police party proceeded with the accused to Room 504 Purnama E Hotel. The appellant was the sole occupier of Room 504. Inside Room 504, the accused gestured to the ceiling of the bathroom, wherefrom the police recovered part of the drugs stated in the 2nd charge and the cannabis stated in the 3rd charge. Under the mattress, the police uncovered the balance of the drugs stated in F the 2nd charge. The three following charges were brought against the appellant: (i) trafficking in 95.77 grammes of methamphetamine; (ii) possession of 32.57 grammes of methamphetamine; and (iii) possession of 0.26 grammes of cannabis. In defence, the appellant claimed that he had promised PW5 to source for the drugs. G However, the appellant and one Ah Seng had then planned to cheat PW5 by passing off a chemical called "Tawas" as drugs to PW5. The appellant claimed that the substance found by the police was actually "Tawas". The appellant also denied any knowledge of the drugs found in Room 504. The appellant was H convicted and sentenced for all three charges. The appellant appealed on the following grounds: (i) that the trial court erred in holding that PW2 was qualified as a government chemist to analyse the instant drugs since no evidence was led at to his academic and professional credentials and whether he possessed I special skill in the analysis of the dangerous drugs: (ii) that there was no evidence that the weighing instruments were calibrated;

(iii) that there was a break in the chain of custody when the drugs exhibits were not sealed on the spot and that there was no evidence on the movement of the exhibits from its place of safe keeping to the court; (iv) that the appellant did not have exclusive possession and knowledge of the nature of the drugs; (v) that the transaction was not completed as the appellant was still counting the money; (vi) that the opening address of the prosecution failed to comply with s. 179(1) of the Criminal Procedure Code ('Code'), as the learned DPP did not indicate that evidence of an agent provocateur would be adduced; (vii) that since the caution was not immediately read to the appellant, the search list and drugs recovered in Room 108 were not admissible; and (viii) that fingerprints were not lifted from the drugs exhibits.

Held (dismissing the appeal and affirming the convictions and sentences)
Per Jeffrey Tan JCA delivering the judgment of the court:

(1) There was direct evidence on the identity of the alleged offender and any want of fingerprint evidence was of no consequence. (para 14)

(2) There was no cross-examination by the defence on the markings of the drug exhibits. Failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. Thus, no issue could be raised that the drug exhibits were not properly marked. Nevertheless, the submission on the custody/markings of the drug exhibits and the possible mix-up of the exhibits ran counter to the evidence. (para 14)

(3) The findings of the government chemist was not challenged during trial and therefore could not be disputed. The prosecution merely had to adduce evidence as to his qualification in the field of chemistry and that he was a government employed chemist. Anyway, PW2 had given an account of his analysis although there was no necessity for him to support his findings with the details of his analysis. (para 16)

(4) The opening statement is not evidence and does not have to contain elaborate details. The omission of the mention of any part of the prosecution evidence in its opening statement is

A inconsequential and not destructive to the prosecution case. Nor is the prosecution prevented from adducing any evidence not mentioned in its opening statement. (para 18)

(5) Any defect in the caution affected not the admissibility of the
B information evidence, as s. 27 of the Evidence Act 1950 stands alone, quite independently of s. 37A of the Dangerous Drugs Act 1952 ('the Act') and s. 113 of the Code. The fact discovered (drugs on the ceiling) was the consequence of the information received. The information received was clearly
C admissible, but without the confessional content. (para 18)

(6) In relation to the trafficking charge, the weight of the dangerous drugs involved is not a determinative factor. Further, the act of selling is complete upon transfer of the
D property in the goods even though the price has not been paid. The evidence of PW5 was direct evidence of the act of the appellant. The recovery of the drugs from Room 108 substantiated the fact of the act. The evidence of the various meetings and negotiations fortified the fact that the act of the
E appellant was as charged. Thus, the act of trafficking was unmistakably made out, by direct evidence. (para 19)

(7) The appellant was the sole occupier of Room 504 and thus had exclusive possession of Room 504. With exclusive possession, it followed that all proscribed drugs found in Room
F 504 should belong to the sole occupier. The proscribed drugs stated in the 2nd charge were found concealed in some obscure corner above the ceiling and under the mattress. Section 37(g) of the Act presumes that the appellant had knowledge that drugs were so concealed in the room that he
G solely occupied. Thus, it could be deduced that the appellant must have had custody or control of it. All ingredients of the offence of possession were present and proved. (para 20)

(8) It was methamphetamine that was recovered in Room 108 in
H the presence of the appellant. There was absolutely no possibility that the appellant could have sold "Tawas" to PW5. The bare denial by the appellant of knowledge of the drugs in Room 504 was no defence. (para 21)

I

Obiter:

(1) The imposition of a fine for the 3rd charge was strange. The death sentence was imposed for the 1st charge. A sentence must be imposed for the 3rd charge. But given that the maximum penalty was exacted, to further impose a fine, even though for a separate offence, came across as rather harsh and unkind. Instead of a fine, it should have been a custodial sentence, to run concurrently with the custodial sentence for the 2nd charge, as both possession offences were committed at the same time and place and in the one and same transaction. (para 22)

Bahasa Malaysia *Translation Of Headnotes*

Bertindak atas maklumat yang diterima, pihak polis telah mengatur satu operasi untuk mengumpan perayu supaya menjual dadah kepada seorang agen provokatur ('SP5'). SP5 telah menemui perayu dan memberitahu tentang keinginannya untuk membeli dadah. Beberapa pertemuan telah diatur berhubung dengan pembelian. Pada 3 Mei 2003, di Bilik 108 Hotel Park Royal, SP5 telah menyerahkan sejumlah wang kepada perayu. Berikutnya, perayu mengeluarkan sebuah beg berwarna merah dari dalam salah satu stokingnya dan menyerahkannya kepada SP5. SP5 membuka beg tersebut dan mendapatinya mengandungi 3 paket benda bersinar. Dalam pada itu, sementara perayu membilang wang, SP5 memberi isyarat kepada SP7 yang sedang menunggu di bilik bersebelahan. Berikutnya, SP7 menerjah ke Bilik 108 dan menahan dan menangkap perayu. SP7 membaca amaran kepada perayu dan bertanya perayu di mana beliau menyimpan dadah selebihnya. Perayu menjawab "di bilik 504 Purnama Hotel". SP7 menukar soalan dan jawapan kepada bentuk tulisan (P25) dan pihak polis kemudian pergi ke Bilik 504 Purnama Hotel. Perayu adalah penginap tunggal bilik tersebut. Di Bilik 504, perayu memberi isyarat ke arah siling bilik mandi, dari mana polis menemui dadah yang menjadi halperkara pertuduhan kedua dan kanabis yang tercatit dalam pertuduhan ketiga. Tiga pertuduhan berikut telah dihadapkan kepada perayu, iaitu: (i) mengedar 95.77 gram methamphetamine; (ii) memiliki 53.57 gram methamphetamine; dan (iii) memiliki 0.26 gram kanabis. Dalam pembelaannya, perayu mengatakan bahawa beliau cuma berjanji untuk mencari dadah untuk SP5. Namun, beliau bersama-sama dengan seorang Ah Seng

kemudian merancang untuk menipu SP5 dengan menyerahkan suatu bahan kimia yang dinamakan "Tawas" sebagai dadah kepada SP5. Perayu mendakwa bahawa barang yang dijumpai oleh polis adalah sebenarnya "Tawas". Perayu juga menyangkal mempunyai sebarang pengetahuan tentang dadah di Bilik 504. Perayu bagaimanapun telah disabit atas ketiga-tiga pertuduhan. Perayu merayu atas alasan-alasan berikut: (i) bahawa mahkamah bicara khilaf dalam memutuskan bahawa SP2 layak sebagai seorang ahli kimia Kerajaan untuk menganalisa dadah-dadah memandangkan tiada keterangan dikemukakan berhubung dengan kelayakan akademik dan profesional beliau dan sama ada beliau mempunyai kepakaran khas dalam penganalisaan dadah berbahaya; (ii) bahawa tiada keterangan bahawa alat penimbang telah ditentukur; (iii) bahawa terdapat kelompangan pada rantaian jagaan apabila eksibit dadah tidak dimeterai dengan serta merta dan bahawa tiada keterangan mengenai pergerakan eksibit dari tempat simpanan ke mahkamah; (iv) bahawa perayu tidak mempunyai milikan eksklusif dadah dan pengetahuan tentang sifatnya; (v) bahawa transaksi belum disempurnakan memandangkan perayu masih membilang wang; (vi) bahawa ucapan pembukaan oleh pihak pendakwa tidak mematuhi s. 179(1) Kanun Tatacara Jenayah ('Kanun'), kerana yang arif TPR tidak menyatakan bahawa keterangan seorang agen provokatur akan dikemukakan; (vii) bahawa oleh kerana amaran tidak dengan serta merta dibaca kepada perayu, maka senarai gelidah dan dadah yang ditemui di Bilik 108 adalah tidak boleh diterima-masuk; dan (viii) bahawa cap jari telah tidak diambil dari eksibit dadah.

Diputuskan (menolak rayuan dan mengesahkan sabitan dan hukuman)

Oleh Jeffrey Tan HMR menyampaikan penghakiman mahkamah:

(1) Terdapat keterangan terus mengenai orang yang didakwa melakukan jenayah dan kerana itu ketiadaan cap jari tidak memberikan apa-apa kesan.

(2) Tiada pemeriksaan balas dibuat oleh pembelaan berhubung penandaan eksibit dadah. Kegagalan untuk memeriksa balas saksi berhubung satu bahagian penting kes bererti menerima keterangan saksi tersebut. Oleh itu, tiada isu boleh dibangkitkan bahawa eksibit dadah telah tidak ditanda dengan teraturnya.

Apapun, hujah mengenai jagaan/penandaan eksibit dadah serta kemungkinan berlakunya kekeliruan eksibit dadah adalah bertentangan dengan keterangan yang ada.

(3) Dapatan-dapatan ahli kimia Kerajaan tidak dicabar sewaktu perbicaraan dan oleh itu ianya tidak boleh dipertikaikan. Pendakwaan hanya perlu mengemukakan keterangan mengenai kelayakannya dalam bidang ilmu kimia dan bahawa beliau adalah seorang ahli kimia Kerajaan. Walau apapun, SP2 telah memberikan penjelasan mengenai analisanya walaupun tiada keperluan bagi beliau untuk berbuat demikian.

(4) Ucapan pembukaan bukanlah keterangan dan tidak perlu mengandungi butiran secara terperinci. Ketinggalan untuk menyebut mana-mana bahagian keterangan pendakwaan dalam ucapan pembukaan tidak memberi apa-apa kesan dan tidak memudaratkan kes pendakwaan. Pendakwaan juga tidak terhalang untuk mengemukakan keterangan tentang apa yang tidak disebut di dalam ucapan pembukaannya.

(5) Sebarang kecacatan pada amaran yang diberikan tidak menjejaskan keboleh-terimaan keterangan maklumat, memandangkan s. 27 Akta Keterangan 1950 berdiri secara bersendirian, dan bebas dari s. 37A Akta Dadah Berbahaya 1952 ('Akta') dan s. 113 Kanun. Fakta yang ditemui (dadah di siling) adalah akibat dari maklumat yang diterima. Maklumat yang diterima jelas boleh diterima-masuk, tetapi tanpa bahagian pengakuan kandungan.

(6) Berhubung pertuduhan mengedar, berat dadah berbahaya yang terlibat bukanlah faktor penentu. Selain itu, perbuatan menjual telah sempurna dengan perpindahan property in the goods walaupun harganya masih belum dibayar. Keterangan SP5 adalah keterangan terus mengenai perbuatan perayu. Penemuan dadah di Bilik 108 menguatkan fakta perbuatan ini. Keterangan mengenai perjumpaan-perjumpaan dan rundingan-rundingan juga menguatkan perbuatan perayu sepertimana dipertuduhkan. Jelas bahawa perbuatan mengedar telah dibuktikan melalui keterangan terus.

A **(7)** Perayu adalah penginap tunggal Bilik 504 dan oleh itu mempunyai milikan eksklusif Bilik 504. Dengan milikan eksklusif, ianya mengikut bahawa semua dadah terlarang yang dijumpai di Bilik 504 harus dimiliki oleh penginap tunggalnya. Dadah terlarang yang disebut dalam pertuduhan kedua dijumpai
B tersorok di satu sudut terpencil di atas siling dan ditutupi oleh tilam. Seksyen 37(g) Akta menganggap bahawa perayu mempunyai pengetahuan bahawa dadah adalah disorok di dalam bilik di mana beliau adalah penginap tunggalnya. Oleh itu, andaian boleh dibuat bahawa perayu mempunyai jagaan
C atau kawalan ke atasnya. Jelas bahawa kesemua ingredien kesalahan milikan dadah wujud dan telah dibuktikan.

(8) Yang dijumpai di dalam Bilik 108 dengan kehadiran perayu adalah methamphetamine. Tiada sebarang kemungkinan
D bahawa perayu mungkin telah menjual "Tawas" kepada SP5. Juga, penyangkalan kosong perayu akan pengetahuan mengenai dadah di Bilik 504 bukanlah suatu pembelaan.

Obiter:

E **(1)** Pengenaan denda bagi pertuduhan ketiga adalah ganjil. Hukuman mati telah dijatuhkan bagi pertuduhan pertama dan satu hukuman penjara harus dijatuhkan bagi pertuduhan ketiga. Walau apapun, memandangkan satu hukuman maksima telah pun dijatuhkan, mengenakan pula denda kelihatan agak keras
F dan kejam. Maka, sebagai ganti hukuman denda, suatu hukuman pemenjaraan, yang berjalan serentak dengan hukuman bagi pertuduhan ketiga, harus dikenakan, memandangkan kedua-dua kesalahan milikan dilakukan di masa dan tempat yang sama dan dalam satu transaksi yang sama.

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Case(s) referred to:

Aik Ming (M) Sdn Bhd & 3 Ors v. Chang Ching Chuen & 8 Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Browne v. Dunn [1893] 6 R 67 ***(refd)***

Chu Tak Fai v. PP [2006] 4 CLJ 931 FC ***(refd)***

H *Khoo Hi Chiang v. PP & Another Case [1994] 2 CLJ 151 SC* ***(refd)***

Junaidi Abdullah v. PP [1993] 4 CLJ 201 SC ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Leong Siew Hoong v. PP [1987] 1 LNS 118 HC ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

I *Mustakim Chek Man v. PP [2010] 6 CLJ 256 CA* ***(refd)***

PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Mohd Amin Mohd Razali & Ors [2002] 5 CLJ 281 HC ***(refd)***
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***
Timhar Jimdani Ong & Anor v. PP [2010] 3 CLJ 938 CA ***(refd)***
Wai Chan Leong v. PP [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171 SC ***(refd)***
Wan Mohd Azman Hassan v. PP [2010] 4 CLJ 529 FC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 113, 179(1)
Dangerous Drugs Act 1952, ss. 2, 37(d), (g), 37A, 40A
Evidence Act 1950, ss. 27, 114(g)

For the appellant - Voon Lee Shan; M/s Voon & Co
For the respondent - Yaacub Hj Chik; AG's Chambers

Reported by Amutha Suppayah

JUDGMENT

Jeffrey Tan JCA:

[1] The [3] charges against the appellant were (i) that he, on 3 May 2003, at about 5.40pm at Room 108, Royal Park Hotel, Jalan Buangsiol, Limbang, in the District of Limbang, in the State of Sarawak, trafficked in a dangerous drug (95.77 grammes of methamphetamine) (1st charge), and, (ii) that he on 3 May 2003, at about 7.15pm at Room 504, Purnama Hotel, Jalan Buangsiol, Limbang, in the District of Limbang, in the State of Sarawak Royal Park Hotel, Jalan Buangsiol, Limbang, in the District of Limbang, in the State of Sarawak, had in his possession a dangerous drug (32.57 grammes of methamphetamine) (2nd charge), and 0.26 grammes of cannabis (3rd charge).

[2] At the close of the prosecution case, the learned trial judge found that a *prima facie* case had been made for all three charges. The appellant was ordered to enter upon his defence. The appellant elected to give, and in the event gave a statement from the dock. At the end of the entire case, the learned trial judge held that there was no doubt as to guilt. Against conviction and sentence for all three charges, the appellant appealed.

[3] The grounds of appeal and the oral/written submission of learned counsel challenged not the story of the prosecution, as found by the trial judge. We would summarise the story of the prosecution as follows. Acting on information, the narcotics division of the Royal Malaysian Police (police) at Limbang conceived a sting operation to lure the appellant to sell drugs to an agent provocateur (PW5 – Constable Stanley Tutum ak James Ragai). PW5 first telephoned the number, believed to that of the appellant, on 9 April 2003. PW5 introduced himself as a drug dealer and indicated his intention to purchase drugs. PW5 got no response. Later that day, PW5 received a telephone call from that number he had called. The caller informed PW5 that he had drugs for sale. PW5 indicated that he would want the sale to be transacted in Limbang. The next day (10 April 2003), PW5 telephoned the number that he called on 9 April 2003. The person who answered informed PW5 that he was in Limbang. PW5 pretended he could not meet him (caller). A few days later (19 April 2003), PW5 received a call. The caller, who said he was in Limbang, wanted to meet PW5. PW5 agreed to meet the caller at the Royal Park Hotel, Limbang. About 5 to 10 minutes later, the same caller telephoned PW5. PW5 requested the caller to come up to Room 201. About 1 to 2 minutes later, the accused was outside Room 201. Inside Room 201, the accused quoted to PW5 the prices of the drugs. The accused left Room 201 without a deal being struck.

[4] On 30 April 2003, the accused telephoned PW5 and said he was in Limbang. PW5 replied that he (PW5) would contact him (accused) when he (PW5) reached Limbang. Meantime, the police had secured Rooms 108 and 109 at the Royal Park Hotel. In Room 108, the accused related to PW5 the prices of the drugs. The accused agreed to sell the equivalent of 150 grammes of methamphetamine to PW5, at the price of RM21,000. On 1 May 2003, the accused came to Room 108 and talk again to PW5 about the sale of drugs. Later, the accused telephoned and reminded PW5 to be ready with the money. At 2.30am on 2 May 2003, the accused telephoned and instructed PW5 to be ready with RM22,000, it being RM21,000 for the drugs and RM1,000 for 'commission'. At about 2.20pm, the accused telephoned and said he (accused) wanted to see the money. PW5 asked the accused to come to Room 108. At about 2.30pm, the accused was in Room 108. PW5 showed RM10,000 to the accused. PW5 told the accused that the balance would be paid upon delivery of the drugs. The accused left Room 108.

[5] The next day (3 May 2003), at about noon, the accused telephoned and instructed PW5 to standby with RM22,000. Assistant Superintendent of Police Peter Ambuas (PW7) secured that cash and had it handed to PW5. A short while later, the accused telephoned and said to PW5 that he would come over to count the money. About 10 to 15 minutes later, the accused was in Room 108. The accused asked about the money. PW5 handed a bag of money to the accused. The accused found only RM21,000. The accused then proposed, to which PW5 agreed, that the amount of drugs be reduced. The accused wanted to take the money. PW5 did not agree to that without the drugs. The accused nodded and left the room.

[6] At about 5.30pm, the accused was again in Room 108. The accused said that the drugs were ready for delivery and he wanted the money. PW5 said he wanted the methamphetamine. The accused left Room 108. Meantime, PW5 alerted PW7 who was in Room 109 to be on standby. As arranged, PW5 loosened the connecting door between the two rooms. A signal in the Kedayan language was agreed between PW5 and PW7 to spring the trap. Shortly thereafter, the accused was in Room 108. PW5 asked for the drugs. The accused took out a red bag from inside one of his stockings and handed it to PW5. PW5 opened that bag and found 3 packets of a crystalline substance (later marked as exhs. P14(1-3)). PW5 returned that bag to the accused who placed it inside a drawer. PW5 handed the money to the accused who proceeded to count it. Meanwhile, on the pretext of calling his men to pick him up, PW5 telephoned PW7 and gave the signal - "sent a boat, I want to go back" – to spring the trap. Thereupon, PW7 burst into Room 108. PW7 identified himself. The accused moved towards the main door of Room 108, but was restrained by PW5. The accused was arrested. The red bag (it was a red sunglasses bag/casing – see 297ART) of drugs was recovered from the said drawer. The trap money was recovered from the accused. PW7 read a caution to the accused. PW7 asked the accused as to where he kept the rest of the drugs (see p. 197ART). The accused replied "di bilik 504 Purnama Hotel". PW7 reduced the question and answer into writing (P25). The police party then proceeded with the accused in tow to Room 504 Purnama Hotel, Limbang. The appellant was the sole occupier of Room 504. The door of Room 504 was opened with the assistance of the staff of

A Hotel Purnama. Inside Room 504, the accused gestured to the ceiling of the bathroom, wherefrom the police recovered part of the drugs (P15(1-4)) stated in the 2nd charge, and the cannabis (P16G) stated in the 3rd charge. Under the mattress, the police uncovered the balance of the drugs (P17G) stated in the 2nd B charge. The genus and weight of the aforesaid drugs were as per the charges.

[7] In his statement from the dock, the appellant gave a matching account of his meetings/negotiations with PW5 and the C events that transpired in Rooms 108 and 504. But not all were in tandem. It was at variance in the following aspects (in the following summary, the words "he" and "him" denote the appellant, unless otherwise stated). He said to PW5 that he had no drugs but he would source for it. His friend, one Ah Seng, also D had no drugs. Ah Seng said he (Ah Seng) would buy a chemical called "Tawas", and he could pass off that "Tawas" as drugs to PW5. He agreed to that scheme to cheat PW5. At 3.30pm on 3 May 2003, Ah Seng said he (Ah Seng) had secured that "Tawas". Ah Seng spoke to PW5 on the telephone. He told Ah E Seng that he would wait in Room 108 for his (Ah Seng) call. At 4pm, Ah Seng telephoned and informed him that the "Tawas" was packed. He said to Ah Seng to send it to Royal Park Hotel. 20 minutes later, Ah Seng telephoned and said he was at the Royal Park Hotel. He went down to Ah Seng's car and inspected the F "Tawas". He brought the "Tawas" to Room 108. He handed the "Tawas" to PW5. He counted the money that PW5 handed to him. He wanted to leave but PW5 told him to wait. PW5 wanted to call his men to get ready a boat. Someone broke the connecting door. He was pushed to the floor and handcuffed. G What he said was recorded. Photographs were taken. He was taken to Jian Lun Hotel. Then he was taken to the Purnama Hotel. The door of Room 504 could not be opened. Something was stuck in the key hole. The staff of the hotel removed that something with pliers and then opened the door of Room 504 H with the spare key. PW5 asked where he had put "the thing". He said, on the ceiling. The police found "the thing". He was asked to witness the search of Room 504. Under the bed, the police recovered a black plastic bag. He was asked to whom that black plastic bag belonged. He said he did not know.

I

[8] In short, it was the defence that "Tawas" and not any dangerous drug that was sold to PW5. As for the possession charges, absolutely nothing was said by the appellant in his statement save for a denial of his knowledge of the presence of those drugs under the mattress.

[9] In line with the grounds of appeal, learned counsel (Voon Lee Shan) submitted, either in his oral and or written submission, as follows. The trial court erred in holding that PW2 was qualified as a government chemist to analyse the instant drugs. The academic and professional credentials of PW2 must be produced. "The prosecution should lead evidence that PW2 had made special study of dangerous drugs ... and possessed special skill in the detection and analysis of these dangerous drugs ... but there was no such evidence" (see p. 34 of the written submission of learned counsel). There was a doubt as to the correctness of the chemical analysis and the conclusion that the substances were in fact the dangerous drugs as stated. No reasons were given by PW2 for his conclusion. There was no evidence that the weighing instruments were calibrated. The weight would determine the penalty. The readings would be affected if the weighing instruments were not accurate. There was a break in the chain of custody when the drugs exhibits were not sealed on the spot. The police seal "PDRM 400" was in the possession of PW7, and he could have abused its use (see p. 51 of the written submission of learned counsel). Exhibits were taken out from the safe but there was no evidence that the safe was locked. The colour and character of the drug exhibits when seized and when analysed were different. Without individual markings, the witnesses could not have identified the exhibits. Without photographs, there arose a doubt as to the location of the drugs when recovered. There was no evidence on the movement of the exhibits from its place of safe keeping to the court before they were tendered (see p. 96 of the written submission of learned counsel). All said and done, the identity of the exhibits was in doubt. The trial court erred in holding that the appellant had exclusive possession and had knowledge of the nature of the drugs.

[10] Notwithstanding that it was not in the grounds of appeal, learned counsel nonetheless submitted, either in his oral and or written submission, as follows. The transaction was not completed, as the appellant was still counting the money. The opening

address of the prosecution failed to comply with s. 179(1) of the Criminal Procedure Code (Code), as the learned DPP only informed that the prosecution would adduce both direct and circumstantial evidence to prove the charges. It was not indicated that the evidence of an agent provocateur would be adduced. As the caution was not immediately read to the Appellant, the search list and drugs recovered in Room 108 were not admissible (see p. 67 of the submission of learned counsel). The caution was bad in law. The prosecution must prove that the Appellant had exclusive possession of Rooms 108 and 504 to tie him to the drugs. Finger prints were not lifted from the drugs exhibits. PW10 entered the room to clean it. A colleague of PW10 cleaned the bath room. Therefore, the appellant had lost exclusive possession of Room 504. Someone could have planted those drugs inside Room 504. There was no trafficking within the definition of s. 2 of the Dangerous Drugs Act 1952 (Act). There was no possession at the time of arrest. There was no *prima facie* case for all charges.

[11] In his written submission, the learned DPP (Yaacub bin Haji Chik) touched mainly on the law. In his oral submission, the learned DPP pointed to p. 334ART, where it was in evidence that the drug exhibits were locked, and to 299ART, where it was in evidence that the chemist explained that the colour difference of the drugs was because from crystalline form it had turned to powder, which effectively answered those points raised by learned counsel. The learned DPP further submitted that the drug transaction was completed and that notice of the defence case of fake drugs was not raised at the stage of the prosecution case.

[12] One authority that the learned DPP cited was *PP v. Mansor Md. Rashid & Anor* [1997] 1 CLJ 233, which was the prosecution's appeal against the acquittal and discharge of the respondents who were charged with trafficking in dangerous drugs under the Act. In holding that no *prima facie* case had been made out against the respondents at the close of the case for the prosecution, the learned trial judge concluded, *inter alia*, that: (i) there was "a patent break in the chain of evidence" in respect of the handling of the cannabis by the government chemist; (ii) another person (Amran) had access to or was in occupation of the room from which the cannabis was seized and, thus, the respondents could not be said to have exclusive custody and

control of the cannabis; (iii) the prosecution's failure to call Amran or to offer him to the defence would "automatically trigger off the invocation of adverse inferences under s. 114(g) of the Evidence Act 1950"; and (iv) the police informer ('Cholar') was actually an active agent provocateur and, thus, the prosecution's failure to call Cholar or to offer him to the defence would attract adverse inferences.

[13] In allowing the appeal, the Federal Court per Choong Siew Fai CJ (Sabah & Sarawak) (delivering the judgment of the court) held: (i) that in the absence of any cross-examination by the defence on the safe-keeping of the cannabis (or of any suggestion that other chemists might have meddled with the cannabis), the concern of the trial judge, that the cannabis exhibited in court might not be that which was seized from the house in which the respondents lived, was misplaced, and that given that where there was no doubt that the cannabis that was seized and handed to the government chemist and the investigating officer was that which was produced in court, it was not essential for the government chemist to show how she kept the cannabis before returning it to the investigating officer, (ii) that the definition of 'trafficking' in s. 2 of the DDA is wide and includes buying and selling, (iii) that where there is evidence indicating the identities of the alleged offenders and the sale transaction, fingerprint evidence assumes little value or significance, and, (iv) that the drawing of adverse inferences is not a matter of an inflexible rule but depends on the circumstances of each particular case.

[14] In the present case, there was direct evidence on the identity of the alleged offender and any want of fingerprint evidence was of no consequence. Of consequence however was the absence of cross-examination by the defence on the markings of the drug exhibits. It is settled that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony (*Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212, 213, per Raja Azlan Shah CJ, as HRH then was) or "tantamount to accepting the truth of the witness's testimony" (*PP v. Mohd Amin Mohd Razali & Ors* [2002] 5 CLJ 281 per Zulkefli J, as he then was). That rule requiring a party's case to be expressly put to his opponent's material witnesses when they are under cross-examination applies to both criminal

A and civil trials (*Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639). It is not necessary to put the same question to all witnesses (*Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19). But where the opportunity to challenge the opponent's evidence is totally
B eschewed, then it must follow that unchallenged evidence cannot be disputed at all (*Browne v. Dunn* [1893] 6 R 67).

[15] No issue could be raised that the drug exhibits were not properly marked. But since it was raised, then it would have to
C be said that the submission on the custody/markings of the drug exhibits, and the possible mix-up of those drug exhibits, ran counter to the evidence. PW7 had marked those three packets of drugs recovered from Room 108 before he proceeded to Room 504 (see 208ART). Before he proceeded to Room 504, PW7 had
D put those three packets of drugs back into the red bag (see 300ART). That was witnessed by PW5 (see 236ART). PW7 then deposited that red bag and contents into his sling bag. In the case of the drugs recovered from above the ceiling, PW7 had marked and then wrapped them with a shower cap (see 311ART). And
E in the case of the drugs recovered from under the mattress, the evidence was that PW7 had marked them (see 312ART). All bags and contents ended up in PW7's sling bag. But yet there could not have been a mix-up of the exhibits. The red bag that contained them distinguished the packets of drugs recovered from
F Room 108. The shower cap that wrapped them distinguished the packets of drugs recovered from the ceiling. The rest of the drugs would have been those recovered from under the mattress. PW7's identification (see 298ART) of the exhibits as the drugs recovered from Room 108 and from Room 504 was never
G challenged (see cross-examination of PW7 at 344-376ART). Since the identity of the drugs recovered from Room 108 and from Room 504 was not in dispute, the chain of custody was of no importance. It was too late, at the stage of appeal, to dispute the identity of the exhibits, and or to contend that the witnesses
H could not identify, by reason of the absence of their individual markings, those exhibits.

[16] For the same reason that it was not challenged during the trial, the findings of the government chemist could not also be
I disputed. Given that those findings were not challenged, it was, with respect, pedantic to argue that the government chemist had

not given reasons for his findings and or that the government chemist was not competent to conduct the analysis. Indeed, the submission on the non production of the baccalaureate of the government chemist was totally misplaced, for all that was "really required for the prosecution to show for the admission of the chemist's evidence on the identity of the drug was merely to adduce evidence as to his qualification in the field of chemistry and that he was a chemist in the employment of any Government in the Federation and had examined or analysed the drugs" (*Khoo Hi Chiang v. PP & Another Case* [1994] 2 CLJ 151 per Abdul Hamid Omar LP) (see *Junaidi bin Abdullah v. PP* [1993] 4 CLJ 201, where it was held by the former Supreme Court per Jemuri Serjan (Borneo) CJ that a trial judge is entitled to "accept the position of a government chemist as sufficient, without going into his academic qualification or experience", which imposed a lesser evidential burden on the prosecution).

[17] In any case, there were reasons for the findings by PW2 who gave an account of what he did (see 45-63AR), although there was no necessity for him to support his findings with the details of his analysis (see *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221, where it was held by the former Supreme Court per Mohamed Azmi FCJ (delivering the judgment of the Court) that "where the opinion of the chemist is confined only to the elementary nature and identity of the substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step"; incidentally, *Munusamy* was recently followed, again, by the Federal Court in *Chu Tak Fai v. PP* [2006] 4 CLJ 931). Also, there was evidence that the weighing balance was calibrated (see 71-72ART).

[18] There was also no merit in the argument on s. 179 of the CPC or on the caution. Section 179 of the CPC states that "an officer conducting the prosecution shall open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused". But "the opening statement is not (any) evidence. It is thus not a requirement that this statement shall contain elaborate details. The

A omission of the mention of any part of the prosecution evidence in its opening statement, to us, is inconsequential and not destructive to the prosecution case. Nor is the prosecution prevented, later, from adducing any evidence not earlier mentioned in its opening statement" *Timhar Jimdani Ong & Anor v. PP*
B [2010] 3 CLJ 938 per Abdull Hamid Embong JCA, as he then was, delivering the judgment of the court). In the case of the caution, any defect in the caution affected not the admissibility of the information evidence, as s. 27 of the Evidence Act 1950 stands alone, quite independently of s. 37A of the Act and s. 113
C of the CPC. "... for s. 27 to apply, the information must be such as has caused discovery of a fact. In other words, the fact must be the consequence and the information the cause of its discovery. Moreover the information must relate distinctly to the fact discovered" (*Wai Chan Leong v. PP* [1989] 2 CLJ 1168;
D [1989] 1 CLJ (Rep) 171; [1989] 3 MLJ 356, 358, per Gunn Chit Tuan SCJ, as he then was, delivering the judgment of the court). In the present case, there was no doubt that the fact discovered (drugs on the ceiling) was the consequence of the information received. The information received was clearly admissible, but
E without the confessional content (see *Mustakim Chek Man v. PP* [2010] 6 CLJ 256, on the admission of information evidence under s. 27 of the Evidence Act 1950).

[19] The submission "no *prima facie* case" failed also to make
F inroad. In relation to the trafficking charge, the weight of the dangerous drugs involved was not a determinative factor (*Leong Siew Hoong v. PP* [1987] 1 LNS 118). Section 2 of the Dangerous Drugs Act 1952 (Act) defines trafficking as to include the act of selling any dangerous drug. And the act of selling is "... complete
G upon transfer of the property in the goods even though the price has not been paid" (*PP v. Sa'ari Jusoh* [2007] 2 CLJ 197 per Augustine Paul FCJ), is "delivery for money ... even though the money ... has not passed ..." (*PP v. Sa'ari Jusoh (supra)* per Abdul Aziz Mohamad FCJ). It was the unchallenged evidence of PW5
H that the appellant sold that quantity of methamphetamine found in Room 108 to him (PW5). And that evidence of PW5, which was specifically allowed for admission by s. 40A of the Act, was direct evidence of the act of the appellant (see *Wan Mohd Azman bin Hassan v. PP* [2010] 4 CLJ 529, paras 30, per Abdull Hamid
I Embong FCJ). But the incriminating evidence was more than just the word of PW5. The recovery of the drugs from the said drawer

in Room 108 substantiated the fact of the act. The evidence of the various meetings and negotiations fortified the fact that the act of the appellant was as charged. Given all that, it was all so evident that the act of trafficking was unmistakably made out, by direct evidence. It was an open-and shut case.

[20] In relation to the two charges of possession, the evidence was that part of the drugs stated in the 2nd charge was discovered, above the ceiling of the bathroom of Room 504, in consequence of the information received from the appellant. The further evidence was that the appellant was the sole occupier of Room 504. The evidence of PW9 and PW10 (employees of Purnama Hotel) made out, and the guest registration card (P33) substantiated them, that the appellant was the sole occupier of Room 504. As sole occupier, the appellant would have had exclusive possession of Room 504. With exclusive possession, it should follow that all proscribed drugs found in Room 504 should belong to the sole occupier. The proscribed drugs stated in the 2nd charge were found concealed in some obscure corner above the ceiling and under the mattress. Section 37(g) of the Act provides that "if any dangerous drug is found to be concealed in any premises, it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises". The information evidence evinced that the appellant had actual knowledge of the presence of drugs in Room 504 that he solely occupied. Section 37(g) of the Act presumed that the appellant had knowledge that drugs were so concealed in the room that he solely occupied. But knowledge alone is not enough to prove possession. There was no evidence that the appellant was in actual physical possession or in actual physical custody or control of those drugs. Yet it could still be deduced that the appellant must have had custody or control of it on account of the following factors. The appellant was the sole occupier of Room 504. Hence, the appellant had exclusive possession of Room 504. The drugs were concealed. It would be different had those drugs not been concealed, in which case it could be said that anyone with access to Room 504, such as a hotel guest or a member of the hotel staff, could have left it there. But given that the drugs were concealed and that the accused knew they were so concealed, then only the appellant and not any hotel guest or a member of the hotel staff, could have so concealed those drugs. Had any hotel guest or member of the

A hotel staff so concealed those drugs without the knowledge of the appellant, then it could not have been possible for the appellant to have known that drugs were so concealed. There was no direct evidence, but on the facts, it should be that only the appellant could have concealed those drugs. To conceal those drugs, the
B appellant had to have custody or control of it. Either way, with custody or control, s. 37(d) of the Act presumed that the appellant had possession of those drugs in Room 504 and had, until the contrary was proved, knowledge of the nature of those drugs. All ingredients of the offence of possession were present
C and proved.

[21] In as much as there was no defence, there was also no doubt on guilt. The fact of the matter was that it was methamphetamine that was recovered in Room 108 in the
D presence of the appellant. There was absolutely no possibility that the appellant could have sold "Tawas" to PW5. And need it be said, that the bare denial by the appellant of knowledge of the drugs in Room 504 was no defence. Conviction was the correct verdict.

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[22] The imposition of a fine for the 3rd charge was strange. The death sentence was imposed for the 1st charge. A sentence must be imposed for the 3rd charge. But given that the maximum penalty was exacted, to further impose a fine, even though for a
F separate offence, came across as rather harsh and unkind. Instead of a fine, it should have been a custodial sentence, to run concurrently with the custodial sentence for the 2nd charge, as both possession offences were committed at the same time and place and in the one and same transaction. However, that fine
G was left undisturbed, as the appeal against sentence was not taken up in argument.

[23] For these reasons, we unanimously dismissed the appeal and affirm the convictions and sentences of the trial judge.

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